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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LARON CLIFFORD CURTIS, Defendant and Appellant.	E034585 (Super.Ct.No. INF044329) **OPINION**

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Deputy Senior Assistant Attorney General, and Robert M. Foster, Supervising Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant of (1) kidnap, (2) assault with a deadly weapon, and (3) criminal threats. The court imposed nine years eight months, consisting of the upper term of eight years for the kidnap, one year for the assault, and one year for the criminal threats.

Defendant contends: (1) the sentence on the criminal threats count must be stayed pursuant to Penal Code section 654, and (2) the imposition of the upper term and the consecutive sentences was improper under *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403]. We affirm the judgment.

I

FACTS

In early May 2003, defendant separated from his wife, Annjohnnette Curtis. Ms. Curtis obtained a restraining order against defendant at that time, prohibiting him from contacting her or their young daughters La'ron Janee and Jahnese.

On May 24, 2003, about 1:00 p.m., Ms. Curtis drove up to her house and parked. With her in the car were her 12-year-old cousin Deandrea McCarthy, her adult cousin Anita Williams, La'ron Janee, and Jahnese.

As she walked to the house, Ms. Curtis saw defendant by the garage. She was scared and ran into the garage. Defendant ran after her. Ms. Curtis fell on some bags of trash. Defendant said, "Come here. I want to talk to you." Defendant was holding a crowbar.

Ms. Curtis agreed to talk to defendant. Ms. Williams entered the garage and asked defendant what he was doing. Defendant said, "I'm her husband. I want to talk to her."

As Ms. Curtis was walking backward out of the garage, there was a shuffle, and defendant hit her in the head with the crowbar.

Ms. Curtis fell down. Defendant said, "Look what you made me do." Defendant was trying to make Ms. Curtis get back in her car and succeeded in getting her into the passenger's side of the car. She locked the car and tried to call 911 on her cell phone. Her daughters and her cousin Deandrea were still in the car.

Defendant broke the driver's side window of the car with the crowbar. He opened the door, and Ms. Curtis jumped out and tried to run to a neighbor's house. She fell down. Defendant pulled Ms. Curtis up and told her to get in the car.

Ms. Curtis got in the car, and defendant started the engine and began driving down the street. As he drove, defendant was hitting Ms. Curtis with his fist, and he said, "You made me get to this point and this is till death do us part." She took the statement as a threat and thought defendant was going to hurt or possibly kill her. Defendant kept repeating the phrase "till death do us part" as they drove on.

Defendant drove about half a mile, to Ms. Curtis's father's residence in the vicinity of the Mission Lakes Country Club. Deandrea lived at that residence as well. Defendant told Deandrea to get the children out of the car and into her house.

Ms. Curtis jumped out of the car and ran. She fell down in the street and saw defendant coming toward her with the crowbar. He was trying to get her to get up and go with him to the car. She thought he was hitting her but was not sure. He put the point of the crowbar in her chest and said, "I'll kill you right here, bitch, in the street."

Ms. Curtis believed defendant was going to hurt her and could possibly kill her. She got up several times to run and at one point tried to stop a car that was passing by. Each time, defendant chased her, and she kept falling back to the ground. Defendant was hitting Ms. Curtis on her upper body, head, and right side.

A nearby resident, Raven Longbow, was driving by with his wife and daughter. Mr. Longbow and his wife saw defendant hit Ms. Curtis over the head numerous times with the crowbar. Mrs. Longbow estimated defendant hit Ms. Curtis more than 15 times. Mrs. Longbow immediately called 911 on her cell phone.

Mr. Longbow stopped his car, and Ms. Curtis jumped in the back seat. She was bleeding profusely, and there was blood all over her face. As they drove from the scene, they saw the police coming. Ms. Curtis reported the incidents to an officer.

Defendant drove to the police station, where he was apprehended and interviewed. After waiving his *Miranda*[1] rights, defendant said he had gone to Ms. Curtis's house to talk to her about visitation with his children. He also said Ms. Curtis agreed to go with him to her father's house, so they could talk about the kids. Defendant admitted he had broken the car window and had hit Ms. Curtis in the arm and on the head when they were driving. Defendant denied ever hitting Ms. Curtis with the crowbar but admitted he had used it to scare Ms. Curtis.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436

Ms. Curtis received two stitches for the head wound she suffered when defendant hit her with the crowbar. She also sustained a bruise on her chest from the crowbar being held there and additional bruises on her left shoulder, left side, and knees.

II

DISCUSSION

A. *Penal Code section 654*

Defendant contends the sentence on count three, for making criminal threats, must be stayed pursuant to Penal Code section 654 (section 654) because that offense was integral to the kidnapping charged in count one and the assault charged in count two. Subdivision (a) of section 654 provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 applies not only to the same criminal act, but also to an indivisible course of conduct committed pursuant to the same criminal intent or objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209, citing *Neal v. State of California* (1960) 55 Cal.2d 11; see also *People v. Perez* (1979) 23 Cal.3d 545, 551.) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective,

'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"'A defendant's criminal objective is "determined from all the circumstances and is primarily a question of fact for the trial court, whose findings will be upheld on appeal if there is any substantial evidence to support it." [Citation.]' [Citation.]" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469; accord, *People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.) In making that determination, an appellate court "must 'view the evidence in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

Viewing the record most favorably to the judgment, we conclude there was substantial evidence from which the court could conclude defendant's offense of making criminal threats was based on conduct that was divisible from the conduct involved in his other offenses and was committed pursuant to a criminal intent that was divisible from the intent involved in his other offenses.

Defendant asserts it is clear from the prosecutor's argument to the jury that the threat charge was based solely on defendant's statement in the car, "Till death do us part," which occurred in the course of the kidnapping and assault. However, the record shows the prosecutor did not rely solely on the statement in the car, but also argued that defendant's later statement to Ms. Curtis that he would kill her "in the street" qualified as a criminal threat. The prosecutor argued:

"This is another one of those circumstances when there's a couple different times when Mr. Curtis made a threat to Ms. Curtis that she thought was a threat to her life and that she was in fear for her life.

"The first one that she told you about was in the car when he was punching her and telling her, 'Till death do us part,' and she took that to mean, in her words, that one of us wasn't going to be around. She said that, 'I wasn't going to be around anymore.' . . .

"The second time was when she was in the street laying down and Mr. Curtis had the crowbar to her chest and said, 'Don't make me kill you in the street here, bitch.'"

Accordingly, the trial court reasonably could have found that at least one criminal threat incident arose out of different conduct involving a different intent than the other offenses. Defendant had already committed kidnap and assault by the time he threatened Ms. Curtis in the street. "Generally, to prove the crime of kidnapping, the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. [Citation.]" (*People v. Jones* (2003) 108 Cal.App.4th 455, 462, citing Pen. Code, § 207, subd. (a), fn. omitted.) By the time of the altercation in the street, Ms. Curtis had already been moved against her will for a substantial distance. The threat in the street was not incidental to the kidnap for purposes of section 654.

Similarly, "[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) "'Assault with a

deadly weapon is nothing more than an assault where there is used either a deadly weapon or any means of force likely to produce "great" bodily injury.' [Citation.]" (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481.) Defendant had already assaulted Ms. Curtis, both with a deadly weapon, the crowbar, and by means of force likely to produce great bodily injury, at the time of the incident in the street. He assaulted her with the crowbar in the garage and with his fist in the car. The threat in the street to kill Ms. Curtis was not incidental to the offense of assault, notwithstanding the fact defendant continued to assault Ms. Curtis after she jumped out of the car.

Decisions involving analogous facts demonstrate that offenses committed after a kidnap victim has been transported, when the defendant has had time to reflect, are divisible from crimes committed prior to that point. In *People v. Green* (1996) 50 Cal.App.4th 1076, the defendant and his companion approached the victim in a garage, placed a gun to her head, and took her purse. The defendant, by himself, then kidnapped the victim and drove her to a secluded area where he committed sexual offenses against her. After doing so, he took her car by force. The court held the defendant could be punished for both robbery and carjacking, stating: "Because the carjacking was thus separated in time and place from the initial robbery of [the victim's] purse and was interrupted by the sexual attack perpetrated by Green, the record contains sufficient evidence to support the trial court's explicit finding the taking of the purse and the taking of the vehicle were separate incidents which merited separate and additional punishment." (*Id*. at p. 1085.)

In *People v. Surdi* (1995) 35 Cal.App.4th 685, the court held the defendant was properly punished for both kidnap and mayhem, where the mayhem charge was based on stabbing incidents that occurred before, during, and after the transportation of the victim by the defendant and fellow members of his gang, the Mob. The court stated: "[T]he offenses presently under review did not arise from a single volitional act. Rather, they were separated by considerable periods of time during which reflection was possible. Lomeli's initial stabbing attack was interrupted in the van to permit Surdi to strap down Sanchez with a seat belt. There was also a break in the action when the group stopped at a school and discussed whether to abandon Sanchez there. After ample time to consider their actions, the group resumed the attack while taking Sanchez to the riverbed, where Mob members took turns stabbing Sanchez until they thought he was dead. [¶] The fact Surdi assisted *multiple* stabbing episodes, each of which evinced a *separate intent* to do violence, precludes application of section 654 with respect to the offenses encompassed within the episodes." (*Id*. at pp. 689-690.)

Surdi relied on *People v. Trotter* (1992) 7 Cal.App.4th 363, in which the court held the defendant properly could be punished for two counts of assault on a peace officer with a firearm for firing three shots at a pursuing officer. Two of the shots were fired about a minute apart, while the third was fired seconds after the second. The court stated: "Each shot posed a separate and distinct risk to Bledsoe and nearby freeway drivers. . . . [¶] . . . Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable." (*Id*. at p. 368.) Thus, the court

concluded, "even under the long recognized 'intent and objective' test, each shot evinced a separate intent to do violence . . . ." (*Ibid*.)

In *People v. Latimer*, *supra*, 5 Cal.4th 1203, 1212, the California Supreme Court cited *Trotter*, and, with explicit reference to *Trotter* and similar decisions, stated, "[W]e do not intend to question the validity of decisions finding consecutive, and therefore separate, intents, and those finding different, if simultaneous, intents. [Citation.] Multiple punishment in those cases remains appropriate." (*Latimer*, at p. 1216; see also *People v. Surdi*, *supra*, 35 Cal.App.4th at p. 689, fn. 7 [*Latimer* "expressly approved" *Trotter*].)

Defendant contends the kidnap and the criminal threats in this case involved the same intent because the threats were closely related to the purpose of the kidnap, to compel Ms. Curtis to talk to defendant. While perhaps the trial court could have concluded defendant threatened Ms. Curtis in the street solely for the purpose of persuading her to talk to him, the record certainly did not compel that conclusion. Ms. Curtis had agreed to talk to defendant while they were still at her house. It was only after defendant hit her with the crowbar and forced her into the car that she started to resist.

When he threatened to kill Ms. Curtis in the street, defendant had driven half a mile, with ample time to reflect on his next move. Subsequently, he hit Ms. Curtis over the head with the crowbar at least 15 times, in addition to threatening to kill her in the street. It seems exceedingly unlikely that by that time defendant actually believed his threat was going to persuade Ms. Curtis to talk to him. It is far more likely he simply became enraged and wanted to inflict as much suffering on her as possible. Ms. Curtis,

for one, testified she believed defendant was going to hurt her and could possibly kill her. She said nothing remotely suggesting that at that point she believed, or that defendant told her, that he just wanted to talk to her.

People v. Mendoza (1997) 59 Cal.App.4th 1333, on which defendant relies, is readily distinguishable.[2] In *Mendoza*, the victim testified against the defendant's brother at a preliminary hearing. Later, the defendant told the victim she had "fucked up his brother's testimony," and that he was going to "talk to some guys from Happy Town," a street gang of which the defendant and his brother were members. (*Id.* at p. 1337.)

The *Mendoza* court held it was improper to punish the defendant separately under Penal Code section 422 for making a terrorist threat and under Penal Code section 136.1, subdivision (c)(1) for dissuading a witness by force or express or implied threat of force or violence. It was undisputed that both offenses "arose from a single act. Indeed, in both opening and closing arguments the prosecutor informed the jury the two crimes arose from the same act. For example, in closing argument the prosecutor argued: 'Those are the two charges. They both arise out of the same facts, out of the same conduct and words of Angel Mendoza to Elva on August 21st.'" (*People v. Mendoza*, *supra*, 59 Cal.App.4th 1333, 1346.)

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[2] Defendant primarily relies on *People v. Shelton* (March 26, 2004) C044625. However, the Supreme Court granted review of *Shelton* after defendant's briefing was filed. (Review granted June 16, 2004, S124503.)

The *Mendoza* court rejected the prosecutor's argument that the defendant had two separate intentions, to "scare" the victim and to "dissuade her from future testimony." The court stated that in fact those two intentions were one and the same, because "[h]is objective and intent for scaring her was to dissuade her from testifying in the future." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1346.)

Here, unlike *Mendoza*, the different offenses of which defendant was convicted were not based on a single statement made to the victim, nor did the prosecution in this case try to wring two offenses out of one statement by proposing an artificial distinction between scaring a person and dissuading the person from testifying. Defendant made at least two threats to kill Ms. Curtis. By the time of the second threat, he already had assaulted her numerous times and had transported her against her will. The threat did not stem from the same conduct, did not involve the same intent and objective, and was not incidental to the kidnap and assault.

In addition, "'the purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." [Citations.]'" (*People v. Kramer* (2002) 29 Cal.4th 720, 723.) By gratuitously threatening to kill Ms. Curtis after he had already assaulted her and transported her against her will, defendant demonstrated greater culpability than was involved in the assault and transportation alone. The court properly imposed separate punishment for the criminal threats count.

B. *Validity of Sentence Under Blakely v. Washington*

When it sentenced defendant, the trial court found as aggravating circumstances: (1) the crime involved great violence, great bodily harm, threat of great bodily harm, and

other acts disclosing a high degree of cruelty, viciousness, or callousness; (2) defendant was armed with and used a weapon; (3) defendant's prior convictions as a adult were numerous and of increasing seriousness; (4) defendant had served a prior prison term; and (5) defendant had been under a restraining order when he committed the offenses. Defense counsel made no objection to the court's reliance on any of these factors. The court found no mitigating circumstances.

In *Blakely v. Washington*, *supra*, 124 S.Ct. 2531, the United States Supreme Court reaffirmed the conclusion it had reached in *Apprendi v. New Jersey* (2000) 530 U.S. 466: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490; *Blakely*, at p. 2536.) In *Blakely*, the court further stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]" (*Blakely*, at p. 2537.)

Relying on *Blakely*, defendant argues the court's imposition of the upper term of eight years for the kidnap, and consecutive terms for the other offenses, was impermissible. Defendant notes that under Penal Code section 1170, subdivision (b), where a statute prescribes three possible terms for a crime, the court "shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." He reasons that, under *Blakely*, the maximum statutory punishment in such a case is the middle term, because that is the most the court can impose based solely on the facts reflected in the jury's verdict, without any additional

findings of aggravating circumstances. He similarly reasons that the court cannot impose consecutive terms unless it finds circumstances supporting that choice. (See California Rules of Court, rule 4.406 (b)(5) [court must state reasons for imposing consecutive terms]; rule 4.425 [criteria supporting consecutive terms].)

Therefore, defendant contends, any fact used to impose a sentence greater than the middle term or to impose consecutive terms must, under *Blakely*, be found by a jury beyond a reasonable doubt. As the circumstances on which the court relied in this case to impose the upper term and consecutive terms term were not so found, defendant concludes his sentence violated *Blakely*.[3]

In response, the People argue as a preliminary matter that defendant waived his *Blakely* claim because he did not raise it in the trial court. We find it unnecessary to consider whether a *Blakely* claim can be waived by the failure to assert it in the trial court, because we have decided to exercise our discretion to consider the merits of the claim whether or not it was waived. An appellate court has discretion to consider constitutional issues raised for the first time on appeal, "especially when the enforcement of a penal statute is involved [citation], the asserted error fundamentally affects the validity of the judgment [citation], or important issues of public policy are at issue

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[3] The California Supreme Court currently has before it cases presenting the issues of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of an upper term sentence and the effect of *Blakely* on the trial court's authority to impose consecutive terms. (*People v. Towne*, review granted July 14, 2004 (S125677); *People v. Black*, review granted July 28, 2004 (S126182).)

[citation]." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Defendant's *Blakely* claim satisfies these criteria, and it is appropriate that we consider it on the merits.

On the merits of the *Blakely* issue, the People defend the imposition of the upper term in this case on the ground that the court based its sentence in part on defendant's record of prior convictions, and *Blakely* exempts from the jury trial requirement any aggravating circumstance based on the fact of a prior conviction. We agree with the People's position.

Both *Apprendi* and *Blakely* recognize that "the fact of a prior conviction" can be found by a judge, even though any *other* fact that increases the maximum statutory penalty for a crime must be found by a jury. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 490; *Blakely v. Washington*, *supra*, 124 S.Ct. 2531, 2536.) The *Apprendi* exception for prior convictions has been *broadly interpreted* by California courts. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 27-28.)

Thus, in *People v. Thomas* (2001) 91 Cal.App.4th 212, the defendant argued the trial court violated *Apprendi* by finding, without a jury, that he had suffered a prior prison conviction for purposes of Penal Code section 667.5. The Court of Appeal acknowledged that a section 667.5 enhancement requires more than a mere conviction, because the accused also must have served a prison term as defined in the statute. (*Thomas*, *supra*, at p. 216.)

However, the *Thomas* court found the *Apprendi* exception for "the fact of a prior conviction" was broad enough to cover a determination that the defendant had served a prison term: "Courts have not described *Apprendi* as requiring jury trials on matters

other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the *more broadly framed issue of 'recidivism*.' [Citations.] Appellate courts have held that *Apprendi* does not require full due process treatment to recidivism allegations which involved elements merely beyond the fact of conviction itself. [Citations.]" (*People v. Thomas*, *supra*, 91 Cal.App.4th 212, 221-222, italics added.)

The California Supreme Court reached a similar conclusion in *People v. Epps* (2001) 25 Cal.4th 19. In *Epps*, the court held the *Apprendi* exception applied not only to the determination that the defendant had suffered a prior conviction, but also to the determination that the conviction was for a serious felony for purposes of the three strikes law: "[O]nly the bare fact of the prior conviction was at issue, because the prior conviction (kidnapping) was a serious felony by definition under [Penal Code] section 1192.7, subdivision (c)(20)." (*Epps*, at p. 28.)

In view of these decisions, we conclude it was proper, notwithstanding *Apprendi* and *Blakely*, for the court to determine based on the probation report that defendant's prior convictions were numerous or of increasing seriousness, and that defendant had served a prior prison term. (Cal. Rules of Court, rule 4.421(b)(2), (b)(3).) The prison term finding was proper under *Thomas*, and if it is not a violation of *Apprendi* and *Blakely* for a court to determine that a prior conviction resulted in a prison term or that the conviction was for a serious felony (*Epps*), then it was not improper in this case for the trial court to determine defendant's prior convictions were numerous or of increasing seriousness. That determination is just as closely connected to "the more broadly framed

issue of 'recidivism'" (*People v. Thomas*, *supra*, 91 Cal.App.4th 212, 222) as were the determinations that were held to come within the *Apprendi* exception in *Thomas* and *Epps*.

It was proper for the court to consider defendant's criminal history based on the probation report: "In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports[,] . . . statements in aggravation or mitigation . . . and any further evidence introduced at the sentencing hearing." (Pen. Code, § 1170, subd. (b).) Further, "[o]nly a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation]." (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) Accordingly, even if a trial court in imposing a term cites one or more invalid aggravating factors, if there remains one valid factor no remand is required. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1759.)

Blakely does not affect this principle of state law. *Blakely* only declares it unconstitutional to increase the maximum punishment for an offense based on a fact that has been *improperly* found by a judge instead of a jury. If there is at least one aggravating circumstance that has been *properly* found by the judge, then an increased sentence becomes available based on that fact. In that case, even if the judge has improperly found one or more *additional* aggravating facts, there has been no *Blakely* violation.

Here, the court properly found two aggravating circumstances. One could be used to support each sentence increase, the upper term and consecutive terms, and one per

increase was sufficient for that purpose. We therefore reject defendant's claim that his sentence violated *Apprendi* and *Blakely*.

Defendant contends this court should not attempt to determine what sentence the trial court would have imposed had it known some of the aggravating circumstances it relied on were invalid under *Blakely* but should instead remand the matter so the trial court itself can consider that question. However, the Supreme Court has stated: "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 492.) We have found nothing in the record indicating a reasonable probability the court would have chosen a lesser sentence had it known some aggravating circumstances were improper. Hence, no reversal is warranted.

Defendant also contends that even aggravating circumstances the court properly could find under *Blakely* had to be found beyond a reasonable doubt rather than by a preponderance of the evidence. Nothing in *Apprendi* or *Blakely* supports that conclusion. In both decisions, the court merely said that "[*o*]*ther than* the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, italics added; *Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2536, italics added.) The court did not indicate, expressly or by necessary implication, that prior convictions must be found beyond a reasonable doubt, and we are

aware of no authority so holding. Rather, *Apprendi* and *Blakely* simply do not apply to prior convictions, which remain subject to state law requiring only proof by a preponderance of the evidence.

C. *Additional Claims*

Defendant also challenges the court's imposition of the upper term based on additional claims of error, which he clearly has waived. In *People v. Scott* (1994) 9 Cal.4th 331, the California Supreme Court stated: "We conclude that the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Id*. at p. 353.)

Defendant's claims that the court improperly used some aggravating circumstances both to impose the upper term and to impose consecutive terms, used elements of the charged crimes as aggravating circumstances, and relied on evidence that was not sufficient to support the aggravating circumstances it found fall squarely into the category of claims that must be raised in the trial court to be preserved for appeal under *Scott*. We therefore decline to consider those claims.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

GAUT
J.